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ALEXANDER L. STEVAS,
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No. 82-183

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JANE DOE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a witness should be permitted to invoke the privilege against adverse spousal testimony before a grand jury where the sole ground for invoking the privilege is that his or her testimony may incriminate a third party, who in turn may incriminate the witness's spouse in some future proceeding.

2. Whether the privilege against adverse spousal testimony should extend to testimony about joint criminal activity of the spouse.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 673 F.2d 688. The memorandum opinion of the district court (App. D, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on March 9, 1982. A petition for rehearing

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[1] The record in this case has been ordered sealed. See App. A, *infra*, 1a n.1. Following the approach of the court of appeals, we do not disclose the names of the interested parties. Respondent is referred to in the caption as "Jane Doe." The district court memorandum and order, which are reprinted in Appendix D, have been altered so as to substitute fictitious names for the names of interested parties.

was denied on May 4, 1982 (App. C, *infra*). On June 24, 1982, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury in the United States District Court for the Eastern District of Pennsylvania is investigating a large drug ring engaged in the distribution of methamphetamine, a non-narcotic controlled substance. Respondent, one of the participants in the ring, pleaded guilty to one count of conspiracy to possess with intent to distribute and to distribute methamphetamine, in violation of 21 U.S.C. 846, and one count of aiding and abetting the distribution of methamphetamine, in violation of 21 U.S.C. 841. The government then subpoenaed respondent to testify before the grand jury concerning events alleged to be part of the conspiracy. The questions did not relate to respondent's husband, but rather to activities of other alleged members of the conspiracy (see C.A. App. 23a-26a). Respondent was granted immunity against self-incrimination under 18 U.S.C. 6002, but she refused to testify, invoking the privilege against adverse spousal testimony. Respondent contended that, even though the government's questions concerned members of the operation other than her husband, her answers might be used against her husband.[2]

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[2] Respondent also claimed that some of the questions that the government proposed to ask her were the product of an illegal interception of an oral communication, and therefore could not be asked before the grand jury. The district court sustained the claim, and the government did not raise the issue on appeal.

The government moved to compel respondent to answer the questions (C.A. App. 8a-12a). In support of the motion, the government filed an affidavit (*id.* at 27a) certifying that "nothing said by [respondent] will be used, either directly or indirectly, against her husband * * * in any legal proceedings." In a subsequent affidavit (*id.* at 32a-33a) the government clarified its commitment, stating:

> [T]he government will not present to the Grand Jury empaneled January 28, 1981 an indictment in which [respondent's] spouse * * * is named as a defendant or as an unindicted co-conspirator. By this procedure, the government intends to effectively prevent the possibility that the Grand Jury empaneled on January 28, 1981 will consider [respondent's] testimony in deciding whether to indict her spouse * * *.

At a hearing before the district court the government acknowledged that the respondent's husband was a target of the investigation (*id.* at 154a). However, the government reiterated that the husband would not be indicted or named as an unindicted co-conspirator by the grand jury before which respondent was to testify and that respondent's testimony would not be used against her husband in any proceeding (*id.* at 153a, 155a). Rather, if respondent's testimony implicated a third party, and if the third party were thereafter willing to testify against the husband, a separate grand jury would be empaneled from which the government would seek the husband's indictment (*id.* at 157a, 159a).

The district court upheld respondent's invocation of the spousal privilege, rejecting the government's arguments that the privilege would not be infringed because the questions addressed to respondent did not relate to her husband and because her husband was not a target of the January 28, 1981, grand jury. The court reasoned (App.

D, *infra*, 31a) that respondent's testimony could nonetheless be "indirectly" adverse to her husband in that, under the government's scenario, it would implicate a third party whose cooperation the government might then obtain in seeking an indictment against the husband before a different grand jury.

2. A divided panel of the court of appeals affirmed the district court's order upholding the claim of privilege (App. A, *infra*). The majority noted that even after this Court, in *Trammel* v. *United States*, 445 U.S. 40 (1980), limited the privilege against adverse spousal testimony to protect only the right of the witness spouse to refuse to testify against the nonwitness spouse, the rationale for the privilege remained the same: the preservation of marital harmony (App. A, *infra*, 6a). It then went on to hold that "when, as in the present case, the Government openly seeks one spouse's testimony concerning the activity of a third party, who is alleged to have engaged in a common criminal scheme with a husband and his wife, and the Government thereby hopes also to reach the nonwitness spouse, the testimony sought is sufficiently adverse to the interests of the absent spouse to permit invocation of the privilege against adverse spousal testimony" (*id.* at 7a). The court reasoned that to compel the testimony of the witness spouse in these circumstances would be to permit the government to do indirectly what it could not do directly (*id.* at 7a-8a). The court further stated that "[t]he potential disruption to marital harmony is in no sense diminished because the impact of the spouse's testimony is delayed" (*id.* at 8a-9a).

The court acknowledged that continued recognition of the privilege against adverse spousal testimony may result in the withholding of probative evidence from the grand jury or at trial and may even allow a guilty party to

escape punishment (*id.* at 10a-11a). However, the court did not analyze the relevance of this concern to the case before it, but simply observed that this feature of the privilege had been carefully considered by this Court in *Trammel* and by the Third Circuit in an earlier opinion.[3]

In his dissent, Judge Adams concluded (App. A, *infra*, 16a) that the majority's holding "unduly extends the marital privilege" and is inconsistent with the dictates of this Court's decision in *Trammel*. Judge Adams observed that the privilege "was never meant to bar absolutely all testimony that, in some way, affected the relationship between the marital partners" (*id.* at 19a), and that traditionally the privilege had been limited to testimony used in the very proceeding at which the nonwitness spouse was indicted or tried (*id.* at 20a). Judge Adams concluded (*id.* at 23a) that the theoretical link between

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[3] The opinion referred to was *In re Grand Jury (Malfitano)*, 633 F.2d 276 (1980), in which the Third Circuit had held the privilege applicable to spousal testimony before a grand jury where both spouses were alleged to have participated in the crime under investigation and where the grant of immunity did not appear to extend to immunity from indictment by that grand jury.

Judge Rosenn, author of the majority opinion in the present case, did add a footnote expressing his concern about the fact that the effect of the court's holding was to protect a third party "who has no entitlement whatsoever to the benefits of the privilege" (App. A, *infra*, 11a n.12). In that footnote, in which Judge Sloviter explicitly declined to concur, Judge Rosenn suggested that the district court could avoid this result by offering to give a nonwitness spouse use-fruits immunity respecting the witness spouse's testimony unless the government decided to forgo that testimony. Judge Sloviter in her concurring opinion (*id.* at 12a-16a) and Judge Adams in his dissent (*id.* at 24a n.7) questioned whether the judicial branch has authority in a nonconstitutional setting to order that such immunity be conferred.

the respondent's testimony and the possible future indictment of her husband was "attenuated at best" and was insufficient to justify extension of the privilege beyond its traditional boundaries.

The government's suggestion of rehearing en banc was rejected, with three judges dissenting.

REASONS FOR GRANTING THE PETITION

This case presents important and recurring questions concerning the scope of the privilege against adverse spousal testimony.[4] The court of appeals held that respondent could invoke the privilege before a grand jury on the sole ground that her testimony might incriminate a third party who in turn might incriminate respondent's spouse in some future proceeding. This holding expands the traditional scope of the privilege in a manner that Judge Adams rightly termed "improvident and unnecessary" (App. A, *infra*, 23a), creating significant obstacles to the government's law enforcement efforts. Procedurally, the holding disrupts the important investigative function of the grand jury by recognizing premature claims of the privilege that operate to cut off unnecessarily the grand jury's access to relevant evidence. On the merits, this expansion of the privilege contravenes the admonition of this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980), that testimonial privileges must be strictly construed, as well as the Congressional mandate, embodied in Fed. R. Evid. 501, that the federal courts should use "reason and experience" in determining the scope of a privilege. In addition, the court of appeals' failure to recognize an exception to the privilege where spouses are

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[4] The present case does not involve the privilege against disclosure of confidential marital communications. See App. A, *infra*, 1a n.2.

partners in crime places the Third Circuit in square conflict with the Seventh and Tenth Circuits. This latter issue was before this Court in *Trammel*, but the Court did not reach it in that case.

1. The court of appeals' holding expands the privilege against adverse spousal testimony in a manner that frustrates the investigative function of the grand jury. We do not here question the general availability of the privilege in a grand jury proceeding — for example, if the witness's spouse is a target of the grand jury and the witness's testimony would implicate the spouse directly. But the court of appeals in this case has held that the privilege may be invoked where (a) the questions do not relate to respondent's spouse and there is no reason to anticipate that her answers would implicate him; (b) the government has affirmed that it will not seek an indictment of respondent's spouse from the grand jury before which the respondent would testify and has promised that respondent's testimony will not itself be used against her spouse in any future proceeding; and (c) respondent's testimony is vital to the investigation of criminal activities of third parties.

The court of appeals' holding is a novel one with potentially drastic consequences for law enforcement efforts. We are aware of no other case in which a court has upheld invocation of the privilege where the spouse was not a target of the grand jury and the testimony was considered adverse only because of the possibility that the government might make indirect, or derivative, use thereof at some future point. The primary beneficiaries of the witness's invocation of the privilege in such circumstances are not the witness's spouse, but the third parties who are under investigation by the grand jury and who are thought to be important members of the criminal enterprise. This application of the privilege places the

government in a serious quandary. Although it carefully avoids questions relating to activities of the witness's spouse, the government nevertheless is forced to choose between foregoing important testimony concerning third-party members of a criminal enterprise and abandoning all efforts to indict the witness's spouse, who may also be a major figure in the enterprise.

a. This Court has recognized the importance of the investigative function of the grand jury. It has stressed the grand jury's right to every man's evidence and has warned against obstacles that delay and impede the grand jury's investigation. See, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *United States* v. *Calandra*, 414 U.S. 338, 350 (1974), quoting *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973). The holding of the court of appeals works against these principles. The result of application of the privilege in this case is that the grand jury is deprived of relevant evidence about third parties who cannot claim any interest in the witness's marital privilege. The present case cannot be regarded as an isolated instance, since it is not uncommon that witnesses called to testify before grand juries are married to persons who conceivably have involvement in the matters under investigation. Under the court of appeals' holding any such witness may refuse to testify not only about his or her spouse, but also about the activities of any third party who may have had some connection with the non-witness spouse.

This sort of interference with the grand jury's function is particularly unjustifiable where the government has promised that the witness's spouse will not be indicted by the grand jury before which the witness testifies. In such circumstances, enforcement of the privilege before the grand jury seems clearly premature. At the time the testimony is given before the grand jury, any adverse

effect on the witness's spouse is wholly speculative. For example, in the present case there cannot be even an allegation of adverse effect unless (a) respondent's testimony leads to indictment of a third party; (b) the third party decides to cooperate with the government; (c) a subsequent grand jury is authorized to investigate the same criminal enterprise; and (d) the third party's testimony before the subsequent grand jury results in indictment of the spouse. Even if all these events were to occur, it still would be necessary to determine whether the connection between the testimony of the witness spouse and the indictment of the nonwitness spouse was significant enough to justify application of the privilege.

Given the speculative nature of any adverse effect on the nonwitness spouse, a witness such as respondent should be required to testify before a grand jury, so long as the witness's spouse will not be indicted by that grand jury. A ruling on the claim of privilege can be deferred until such time, if ever, as any arguable adverse impact develops. Such a procedure strikes a fair and reasonable balance between the government's right to investigate suspected criminal activities of third parties and the witness's interest in marital harmony.

This type of procedure is well established in cases in which a witness asserts the constitutional privilege against compelled self-incrimination. See *Kastigar* v. *United States*, 406 U.S. 441 (1972). In such cases, once the witness receives a grant of immunity that meets minimum constitutional requirements, he may not tie up a grand jury proceeding with arguments about potential future uses of his testimony, but must proceed to testify. If the government later attempts to use the witness's testimony or fruits thereof against him, a hearing is held to determine whether the government's action violates the witness's constitutional privilege against self-incrimination. *Id.* at 460-461.

Such a procedure is a fortiori appropriate in the case of the privilege against adverse spousal testimony. Unlike the privilege against self-incrimination, the privilege against spousal testimony is not rooted in the Constitution, but is based on policy considerations. See *Hawkins* v. *United States*, 358 U.S. 74, 77-78 (1958). Fed. R. Evid. 501 requires federal courts to evaluate particular applications of the privilege in the light of "reason and experience," rather than to consider the privilege in the abstract. Such an analysis must take into account factors such as the nature of the testimony, the manner in which it is used, and the nature of any impact on the nonwitness spouse — factors that as a practical matter can be adequately evaluated only at such time as an actual adverse impact on the nonwitness spouse appears likely to materialize.[5]

The marital privilege is fully satisfied, without extravagant costs to other societal interests, by the practical measure of postponing consideration of a witness's assertion of the privilege before a grand jury, so long as there is no question of the witness's spouse being indicted by that grand jury. If the government should thereafter proceed against the spouse, and it is alleged that the witness's testimony has been or is being used in that

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[5] There is precedent for deferring consideration of a claim of marital privilege where the privilege is invoked by a grand jury witness whose spouse is not a target of the grand jury. See, *e.g.*, *United States* v. *George*, 444 F.2d 310 (6th Cir. 1971), in which the court denied the claim of privilege where the witness's wife was not being investigated by the grand jury. The court stated that if the witness in fact did give inculpatory evidence against his wife and she were then prosecuted, she could object to the introduction of any statement made by her husband at the "proper stage" of her improbable prosecution. *Id.* at 314.

proceeding in violation of the privilege, a court can then consider whether the privilege should apply under the circumstances and take steps to prevent any improper use of the testimony. Cf. *Manness* v. *Meyers*, 419 U.S. 449, 474-475 (1975) (White, J., concurring). Unlike the result produced by the court of appeals holding, this approach minimizes the costs to law enforcement, since the grand jury is enabled to obtain evidence about third parties who can claim no interest in a witness's marital privilege.

b. Even if it were sometimes appropriate to honor a witness's invocation of the privilege before a grand jury investigating only third parties, recognition of the privilege was improper in the circumstances of this case. The court of appeals expanded the privilege in a manner that conflicts with this Court's statements in *Trammel* and with the Congressional mandate that common law privileges should be interpreted in the light of "reason and experience" (Fed. R. Evid. 501). This Court in *Trammel* admonished that testimonial privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Trammel* v. *United States*, *supra*, 445 U.S. at 50, quoting *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

Rather than strictly construing the privilege against adverse spousal testimony, the court of appeals has broadened it considerably beyond its traditional scope. As Judge Adams pointed out in his dissent, the privilege was never meant to bar all testimony that affects the relationship between marital partners (App. A, *infra*, 19a). Under the common law, the privilege was limited to

testimony that "disfavors the other spouse's *legal interests in the very case* in which the testimony is offered." 8 *Wigmore on Evidence* § 2234, at 231 (McNaughton rev. 1961). (emphasis in original). Federal and state courts have characterized the privilege in this manner. See, *e.g.*, *In re Snoonian*, 502 F.2d 110, 112 (1st Cir. 1974); *United States* v. *Burks*, 470 F.2d 432, 435-436 & n.6 (D.C. Cir. 1972); *Halback* v. *Hill*, 261 F. 1007, 1009-1010 (D.C. Cir. 1919); *People* v. *Langtree*, 64 Cal. 256, 30 P. 813 (1883); *State* v. *Parrott*, 79 N.C. 615, 617-618 (1878); *State* v. *Briggs*, 9 R.I. 361, 365-366 (1869). The court of appeals went far beyond the traditional scope of the privilege by upholding its invocation on the basis of speculation about the nexus it might have to other evidence adduced in a hypothetical future proceeding.

Fed. R. Evid. 501 requires the federal courts to apply "reason and experience" in determining the scope of common law privileges, not simply to extend them relentlessly to the outer limits of their conceivable application. This Court in *Trammel* recognized that the courts must weigh the purpose served by the privilege — the public interest in marital harmony — against the burden on legitimate law enforcement needs in a particular factual setting. 445 U.S. at 52-53. The lower courts generally have applied such a case-by-case analysis, in which the public interest in disclosure of evidence is balanced against the extent to which the policy underlying the privilege would be advanced by permitting invocation of the privilege in the particular case. See, *e.g.*, *In re Grand Jury Proceedings (Appeal of Vannier)*, 664 F.2d 423, 429 (11th Cir. 1981), cert. denied, Nos. 80-1071 and 81-1108 (Mar. 8, 1982); *Ryan* v. *Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977); *United States* v. *Cameron*, 556 F.2d 752, 756 (5th Cir. 1977); *United States* v. *Allery*, 526 F.2d 1362, 1366-1367 (8th Cir. 1975).

Here, the court of appeals appears not to have engaged in the sort of balancing analysis prescribed in *Trammel*, but instead produced what Judge Rosenn acknowledged was a "categorical enforcement" of the privilege (App. A, *infra*, 11a n.12). In fact, however, a balancing of the two interests in the light of "reason and experience" indicates that the extension of the privilege in this case is unwarranted. Because respondent's testimony will not implicate her husband directly and because the grand jury before which she testifies will not indict her husband, there is no direct adverse impact of the type that is normally thought to strain the marital relationship.[6] Any indictment of the husband at a later time would result directly from testimony of a third party. As Judge Adams suggests, the relationship between the respondent's testimony and any possible adverse impact on her spouse is "attenuated at best" (App. A, *infra*, 23a). Common sense suggests that any strain on the marital relationship arising from these circumstances must be far less than that resulting from direct implication of a spouse in a proceeding in which the spouse is a target. As Judge Adams observes, there is a "qualitative difference" in the impact of the testimony in these two circumstances (App. A, *infra*, 19a).

On the other hand, as described above, the burden on legitimate law enforcement that results from honoring a witness's assertion of the privilege in a case such as the present one is significant. Here, the result has been frustration of the government's efforts to obtain relevant testimony against an individual who is thought to be an important member of the drug ring under investigation.

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[6] In addition, grand jury proceedings are secret and therefore involve no element of public accusation or incrimination of one spouse by another.

Allowing the privilege to be invoked benefited not the spouse, but a third party who had no interest in the witness's privilege. Balancing of the interests in these circumstances clearly indicates that the privilege should not be recognized.

The court of appeals holding is at odds with the approach taken by other circuits, which have not recognized indirect effects of spousal testimony as grounds for permitting a witness not to testify before a grand jury. For example, in *United States* v. *Weinberg*, 439 F.2d 743 (9th Cir. 1971), the court upheld a claim of privilege asserted before a grand jury where the questions concerned the identity and conduct of persons present during meetings of alleged conspirators, who apparently included the witness's husband. The court observed, however, that the questions could be reframed so as "not to require [the wife] to disclose whether or not her husband was present or participated." *Id.* at 750 n.10. The court did not suggest that there would be any difficulty if the husband's co-conspirators were to testify against him in the future; in fact, the court apparently did not even require the government to promise that the husband would not be indicted by the grand jury before which his wife testified.

In *United States* v. *Armstrong*, 476 F.2d 313 (5th Cir. 1973), the court held that a wife could not refuse to testify before a grand jury against her husband's co-defendants where the testimony did not implicate her husband and where her husband's case had been severed from that of his co-defendants. *Id.* at 315, citing 3 *Wharton's Criminal Evidence* § 777, at 113-114 (12th ed. 1955). The court noted that the wife could be called as a witness at the trials of the husband's co-defendants and that the same rule would apply to testimony before the grand jury. *Ibid.* See also *In re Snoonian*, *supra*, 502 F.2d at 112, in which

the First Circuit stated that the marital privilege would not excuse the witness from testifying at a trial in which his wife was not a defendant even if she had been indicted and was being tried separately. In *Armstrong* and *Snoonian*, as in *Weinberg*, the courts indicated no concern about the possibility, as much present in those cases as in this, that the husband's co-defendants might later testify against the husband.

The court of appeals' holding in the present case also is inconsistent with the explicit holding of the Fifth Circuit in *Appeal of Vannier*, *supra*, that the scope of protection of the privilege against adverse spousal testimony is narrower than that of the privilege against self-incrimination. In *Vannier* the majority refused to allow invocation of the privilege where questions addressed to the wife were objective and contained no reference to her husband, even though the husband was a target of the grand jury. The majority quoted from the First Circuit's opinion in *In re Snoonian:*

> The privilege has not ordinarily been construed to allow one spouse to decline to testify merely because the testimony may incrimate [sic] the other. Wigmore, *supra* at 231, n.2.

Appeal of Vannier, *supra*, 664 F.2d at 429, quoting *In re Snoonian*, *supra*, 502 F.2d at 112. The court in *Vannier* supported its conclusion by pointing to the difference in the purposes and social values that are fostered by the two different privileges. 664 F.2d at 429.

In sum, the holding in the present case represents an unprecedented departure from the generally prevailing understanding of the marital testimonial privilege, limiting the availability of the privilege to circumstances in which the content of the testimony is adverse to the spouse and is sought to be elicited in a proceeding directed against the spouse. And even if it were deemed

appropriate at this time to introduce into the marital testimonial privilege a "fruits" component, the court of appeals has adopted an extravagant and unacceptable formulation of the concept, which threatens serious injury to the investigations of this and future grand juries and confers wholly unjustified windfall benefits on third parties who are suspected of criminal activities and who are plainly outside the intended shelter of the privilege. Such a drastic departure from the existing understanding of the proper scope of the marital testimonial privilege requires review by this Court.

2. An independent and equally significant error of the court of appeals in this case is its recognition of the privilege against adverse spousal testimony where the evidence suggests that the spouses were joint participants in criminal activity.[7] Respondent has pleaded guilty to participation in a drug conspiracy that is thought to have included her husband, and the testimony sought from her involves the activities of other individuals in that same conspiracy. The Third Circuit's refusal to recognize an exception to the privilege in such circumstances conflicts squarely with decisions of the Seventh Circuit and the Tenth Circuit. Those courts, in *United States* v. *Van Drunen*, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), and *United States* v. *Trammel*, 583 F.2d 1166 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980), have held that the privilege is unavailable where the spouses are joint participants in a criminal enterprise.

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[7] The government raised this issue in its petition for rehearing en banc. The government's argument previously had been rejected by a Third Circuit panel in *In re Grand Jury (Malfitano)*, 633 F.2d 276, 278-279 (1980). The government noted in its rehearing petition that it had not raised the argument prior to the rehearing stage because one panel cannot overrule another panel of the same circuit.

The Seventh and Tenth Circuits have reasoned correctly that society's interest in preserving marital harmony is outweighed by the injury inflicted on the public by use of the marital relationship for illicit purposes. As the Seventh Circuit observed:

> [The] goal [of preserving the family] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.

Van Drunen, *supra*, 501 F.2d at 1396. See also *Trammel*, *supra*, 583 F.2d at 1169-1170; *Ryan* v. *Commissioner*, *supra*, 568 F.2d at 543-544. The Seventh Circuit in *Van Drunen* noted that the privilege made the most sense in cases "where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime." 501 F.2d at 1397.

This view is consistent with reason and experience. Where spouses are co-conspirators, the injury inflicted on the public by use of the marital relationship for illicit purposes outweighs any societal interest in preserving marital harmony. Collective criminal agreement is recognized as in itself a serious danger to the public. *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961). Permitting invocation of the privilege in the case of conspiracy may frustrate the government's ability to obtain relevant evidence relating to key members of a conspiracy who happen to be married. At the same time, the purpose served by the privilege is weak in such circumstances. Society's interest in fostering harmony in marriages, which ordinarily may be thought to contribute to the rehabilitation of a defendant-spouse, is not well served by providing an incentive for recruiting one's spouse into

criminal activity,[8] thereby encouraging abuse of the relationship that the privilege is designed to protect. The decisions of the Seventh and Tenth Circuits embody the better view, and the Third Circuit decision in the present case should be reversed on this ground.

The analysis of the Seventh and Tenth Circuits accords with exceptions to other privileges in cases where the privileged relationship is similarly abused. Thus, it is well established that a client who uses his attorney to obtain guidance in the commission of a crime is not protected by the attorney-client privilege against his attorney's taking the stand to testify about their conversations. *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F.2d 899 (2d Cir. 1977); *Hyde Construction Co.* v. *Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972); *United States* v. *Friedman*, 445 F.2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971). It has also been held that the privilege protecting confidential communications between husband and wife does not apply to communications in furtherance of criminal activity. See *United States* v. *Mendoza*, 574 F.2d 1373, 1379-1381 (5th Cir. 1978); *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973); *State* v. *Smith*, 384 A.2d 687, 693-694 (Me. 1978); *People* v. *Watkins*, 89 Misc. 2d 870, 393 N.Y.S. 2d 283 (Sup. Ct. 1977); *Gill* v. *Commonwealth*, 374 S.W. 2d 848, 851 (Ky. 1964); but see *Smith* v. *State*, 344 So. 2d 915, 919 (Fla. Dist. Ct. App. 1977). The Third Circuit view, unlike that of the Seventh and Tenth Circuits, fails to recognize that the privilege against adverse testimony by a spouse, like other privileges,

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[8] As this Court observed in *Trammel*, quoting Jeremy Bentham, the privilege "goes far beyond making 'every man's house his castle,' and permits a person to convert his house into a 'den of thieves' " (445 U.S. at 51-52).

should "take[ ] flight if the relation is abused" (*Clark* v. *United States*, *supra*, 289 U.S. at 15), and that the marital relation is clearly abused where the spouses jointly participate in crime.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1982

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[9] There is no question of mootness in the present case. The term of the grand jury, which was convened on January 28, 1981, has expired. However, the government would seek to question respondent before a new grand jury it it were ultimately to prevail in this case. Accordingly, a clear controversy exists, the formal elements of which are virtually certain to recur between the same parties. See *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377-378 (1979), and cases there cited.